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In The

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE INSTITUTE FOR JUSTICE AND THE CATO INSTITUTE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Toward that end, the Institute seeks to reinvigorate those founding principles, such as the separation of powers, crucial to the preservation of freedom.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, including the idea that the U.S. Constitution separates power among three coordinate branches of the federal government in order to preserve citizens' liberty. The instant case squarely addresses the limits on the power of Congress to delegate its power to executive agencies and thus is of central interest to Cato and the Center.

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[1] In conformity with Supreme Court Rule 37, *amici* have obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the Clerk. *Amici* also state that counsel for a party did not author this brief in whole or in part and that no persons or entities other than *amici*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Section 109(b)(1) of the Clean Air Act, 42 U.S.C. § 7409(b)(1), is unconstitutional as applied to non-threshold pollutants because the statute provides no intelligible principle by which the Environmental Protection Agency (EPA) is to set National Ambient Air Quality Standards (NAAQS) for such pollutants.

In order to preserve the liberty of the American people, the Constitution's Framers separated power among three coordinate branches of the federal government. Implicit in this structure is the idea that the political branches may not reallocate authority among themselves as they see fit. Accordingly, this Court has long recognized that Congress may not freely delegate the legislative powers vested in it by the Constitution.

In order to enforce what is known as the nondelegation doctrine, this Court has held that Congress must provide executive agencies or others with an intelligible principle to govern the exercise of delegated authority. But unfortunately, in a series of precedents over the last 60 years, this Court has refused to meaningfully enforce this important constitutional requirement. Instead, it has allowed Congress to avoid its responsibility to make difficult policy choices, thereby impairing the separation of powers and diminishing individual liberty. The instant case, however, presents this Court with an appropriate opportunity to breathe life into the intelligible principle test once again.

When Congress passed the Clean Air Amendments of 1970, it assumed that those air pollutants falling under

the ambit of Section 109 were threshold pollutants, meaning that there was a concentration level above which those pollutants were a threat to health and below which they were not. It thus directed EPA to establish primary air quality standards below the threshold concentration for adverse health effects, mandating that such standards be "requisite to protect the public health" with "an adequate margin for safety." 42 U.S.C. § 7409(b)(1).

It soon became clear, however, that many, if not all, Section 109 pollutants were actually non-threshold pollutants, meaning that adverse health impacts occurred at *any concentration level above zero*. While Congress recognized this reality at the time that it passed the Clean Air Amendments of 1977 and clearly indicated that it did not want the NAAQS for non-threshold pollutants set at zero, it nonetheless failed to set forth a new intelligible principle. As a result, the principle by which EPA is directed to set air quality standards for non-threshold pollutants is not only unintelligible but it is nonsensical, as it is impossible for EPA to set standards that "protect the public health" with an "adequate margin for safety."

The statute as currently written requires EPA to engage in an entirely arbitrary exercise of determining a degree of adverse health effects that is acceptable, an inquiry for which the Clean Air Act provides no guidance. Therefore, in a matter with enormous impact on both the health of the American people and the vitality of the nation's economy, Congress has abdicated its constitutional responsibility to make a fundamental policy choice. Although it easily could have provided an intelligible principle to cabin EPA's discretion, Congress has

instead impermissibly delegated its legislative power to the agency.

While the D.C. Circuit correctly ruled below that EPA's construction of Section 109(b)(1) in its ozone and particulate matter (PM) rules effectuated an unconstitutional delegation of power, its decision to allow EPA "an opportunity to extract a determinate standard on its own"[2] was inappropriate. The nondelegation doctrine does not permit an agency to supply its own intelligible principle where none is present in the statute. The point of the nondelegation doctrine is not that *agencies must provide rational explanations* for their behavior, but that *Congress must set forth an intelligible principle* to guide agency discretion. As Congress has failed to do so here, this Court should declare Section 109(b)(1) to be unconstitutional as applied to non-threshold pollutants.

I. THIS COURT SHOULD MEANINGFULLY ENFORCE THE NONDELEGATION DOCTRINE.

The separation of powers plays a crucial role in our constitutional framework. As this Court has noted, "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). Although many aspects of the Constitution are premised on the importance of checks and balances, central to the Framers' design was the distribution of the

[2] *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, 1038 (D.C. Cir. 1999).

federal government's power among three coordinate branches, with legislative powers vested in Congress, executive powers vested in the President, and judicial powers vested in this Court as well as such inferior courts as Congress would establish. See U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1.

This arrangement is not designed to secure efficiency or to promote administrative convenience; rather, "[t]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed." *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.* 501 U.S. 252, 272 (1991).[3] Accordingly, this Court often has rejected efforts by Congress and the President to rearrange power in a manner hostile to our constitutional framework. In no less than six cases over the last 25 years, this Court has struck down congressional enactments as contrary to the constitutionally mandated separation of powers.[4] In these

[3] See also *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured . . . to provide avenues for the operation of checks on the exercise of governmental power").

[4] See *Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating Line Item Veto Act); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (invalidating provision of Transfer Act regarding composition of Metropolitan Washington Airports Authority's Board of Review); *Bowsher v. Synar*, 478 U.S. 714 (1986) (invalidating portion of the Gramm-Rudman-Hollings Act); *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating "legislative veto" provision of the Immigration and Nationality Act); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50

cases, this Court reached the same conclusion whether Congress had aggressively encroached on another branch's power or had instead chosen to voluntarily cede its own power. Compare *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down attempt by Congress to assign executive powers to officer under its control) with *Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating congressional attempt to delegate to the President the power to amend Acts of Congress). This is because the separation of powers is not designed to safeguard the interests of those occupying public office; rather, its purpose is to protect the liberty of the American people.

In *Clinton v. City of New York*, Justice Kennedy explained why this Court must not allow a branch of government to voluntarily relinquish the powers vested in it by the Constitution:

> To say the political branches have a somewhat free hand to reallocate their own authority would seem to require the acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution's structure requires a stability which transcends the convenience of the moment. The latter premise, too, is flawed. *Liberty is always at stake when one or more branches seek to transgress the separation of powers.*

(1982) (invalidating Bankruptcy Act's delegation of authority to Article I courts); *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating composition of the Federal Election Commission as established by the Federal Election Campaign Act of 1971).

524 U.S. at 449-50 (Kennedy, J., concurring) (citations omitted) (emphasis added).[5]

It has long been established, therefore, that Congress may not freely delegate its legislative powers. This principle, commonly referred to as the nondelegation doctrine, traces its roots back to two of Europe's most distinguished and influential political philosophers. John Locke, writing in 1690, stated that "[t]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others."[6] Locke pointed out that the power vested by the people in the legislature was "only to make laws, and not to make legislators."[7] Montesquieu, furthermore, warned of the dangers that would result from allowing legislative and executive powers to be joined together: "When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner."[8]

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[5] Justice Kennedy also observed, "That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. Abdication of responsibility is not part of the constitutional design." *Clinton*, 524 U.S. at 452 (citations omitted).

[6] John Locke, *Second Treatise of Government, in the Tradition of Freedom* 244 (M. Mayer ed., 1957).

[7] *Id.*

[8] *The Federalist* No. 47, at 303 (C. Rossiter ed., 1961) (quoting Montesquieu).

This sentiment had a marked impact on the Framers of the Constitution. James Madison quoted that passage from Montesquieu in *Federalist* No. 47, and, in addition, echoed the French philosopher's view that "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."[9] This Court has acknowledged the influence of Montesquieu's work as well: "the Constitution was . . . true to Montesquieu's well-known maxim that the legislative, executive, and judicial departments ought to be separate and distinct." *Buckley v. Valeo*, 424 U.S. at 120.

It is not surprising, therefore, that the nondelegation doctrine emerged early in this Court's jurisprudence. In *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825), for example, Chief Justice Marshall wrote, "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative." The doctrine, however, did not figure prominently in this Court's nineteenth-century jurisprudence for congressional delegations in that era were few and far between. Those delegations that did take place almost always shared at least one of two common features. First, Congress "legislated in contingency," meaning that it authorized the President to take prescribed action when he ascertained certain facts to be true.[10] And second, almost all such "delegations" arose in those areas

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[9] *Id.* (quoting Montesquieu).

[10] See, e.g., Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in* Clinton v. City of New York*: More Than "a Dime's Worth of Difference"*, 49 Cath. U. L. Rev. 337, 342-46 (2000).

of foreign affairs and trade that are closely related to the President's executive power to formulate foreign policy.[11]

In *Field v. Clark*, 143 U.S. 649 (1892), for example, the Court considered the constitutionality of a statute removing tariffs on the importation of certain agricultural goods, but authorizing the President to reimpose tariffs upon goods from any country failing to treat American goods reciprocally. Rejecting a nondelegation doctrine challenge, the Court held that the statute did not empower the President to make law but instead authorized him to find facts in enforcing the trade policy established by Congress. 143 U.S. at 692-93. In so holding, however, this Court strongly reaffirmed the vitality of the nondelegation doctrine: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Id.* at 692.

Near the end of the century, Congress began to delegate authority more frequently, and as a result more cases involving delegation began to reach this Court. In some of these cases, congressional attempts to relinquish legislative powers were struck down. See *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924) (prohibiting Congress from delegating the "power to alter the maritime law"); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 87-88 (1921) (holding that the Lever Act, which made it unlawful for any person to charge unreasonable prices

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[11] See *id.* at 343-346; David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1262-63 (1985).

for "necessaries," amounted to a delegation by Congress of legislative power to courts); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920) (invalidating improper delegation of maritime law to the states). In other cases, delegations were upheld; but in each of these instances, this Court made it clear that delegated authority must be accompanied by adequate congressional guidance. See, e.g., *Union Bridge Co. v. United States*, 204 U.S. 364, 386 (1907) ("[T]he Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power"); *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904) ("[The Tea Act] does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable").

In *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), a case like *Field v. Clark* involving tariff adjustment, this Court attempted to synthesize its nondelegation doctrine precedents. In doing so, it recognized the importance of maintaining the separation of powers, see *id.* at 406 ("[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President"), while at the same time acknowledging that enforcement of the principle was not susceptible to a bright-line rule if the federal government was to remain capable of effectively exercising its substantive powers. See *id.* ("In determining what [a branch of government] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of governmental co-ordination").

Striking a balance between these countervailing concerns, this Court set forth a new standard for assessing the constitutionality of congressional delegations, explaining that "[i]f Congress shall lay down by legislative act an intelligible principle [to govern the exercise of delegated authority], such legislative action is not a forbidden delegation of legislative power." *Id.* at 409.

Implementing the "intelligible principle" test, this Court soon struck down two statutes for failing to set forth adequate standards to guide the conduct of the executive branch. In *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), it invalidated a section of the National Industrial Recovery Act (NIRA) authorizing the President to prohibit the interstate transportation of petroleum priced in violation of state-imposed production quotas. The Court complained that the statute "left the matter to the President without standard or rule, to be dealt with as he pleased." *Id.* at 418. Similarly, in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), this Court struck down another section of the NIRA, this one empowering the President to establish "codes of fair competition" in certain industries "for the protection of consumers, competitors, employees, and others, in furtherance of the public interest." The Court once again observed that Congress' grant of authority was open-ended, "set[ting] up no standards, aside from the general aims of rehabilitation, correction, and expansion described in section one [of the NIRA]." *Id.* at 541.

In the 65 years since *Schechter*, however, this Court has largely abdicated its responsibility of ensuring that congressional delegations of authority are accompanied by intelligible principles. See *Industrial Union Dep't v.*

American Petroleum Inst., 448 U.S. 607, 674-75 (1980) (Rehnquist, J., concurring) ("[T]he principle that Congress could not simply transfer its legislative authority to the Executive fell under a cloud"). As a result, it has upheld numerous delegations of open-ended authority against nondelegation doctrine challenges. See, e.g., *Yakus v. United States*, 321 U.S. 414, 426-27 (1944) (upholding delegation to Price Administrator of authority to fix "fair" and "equitable" commodities prices); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (affirming FCC's authority to regulate broadcast licensing "as public interest, convenience, or necessity require"). Crucially, though, this Court has never overruled the *J.W. Hampton, Jr., Co.* "intelligible principle" test, ostensibly continuing to apply it even in cases affirming the constitutionality of seemingly unbounded delegated discretion. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Moreover, despite the general trend, various Justices, from time to time, have called for exhuming the nondelegation doctrine from this Court's jurisprudential graveyard.

In *Industrial Union Dep't*, for example, Chief Justice Rehnquist argued in a concurring opinion that a provision of the Occupational Safety and Health Act of 1970 ran afoul of the nondelegation doctrine. In doing so, he identified the important functions served by the doctrine: (1) "ensur[ing] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will"; (2) guaranteeing that the recipients of delegated authority are provided with "an 'intelligible principle' to guide the

exercise of the delegated discretion"; and (3) facilitating judicial review of "the exercise of delegated legislative discretion." 448 U.S. at 685-86. See also *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

While each of these functions may appear unrelated to the others, they are not, for each, in its own way, is a manner in which the nondelegation doctrine helps to secure the liberty of the American people. For this reason, liberty is threatened when the nondelegation doctrine, an important component of the separation of powers, is ignored. And it is for this reason that this Court should revitalize the nondelegation doctrine.

II. SECTION 109(B)(1) OF THE CLEAN AIR ACT FAILS TO PROVIDE AN INTELLIGIBLE PRINCIPLE BY WHICH TO SET AIR QUALITY STANDARDS FOR NON-THRESHOLD POLLUTANTS.

The instant case provides this Court with an important opportunity to reinvigorate the nondelegation doctrine by meaningfully applying the intelligible principle test set forth in *J.W. Hampton, Jr., & Co.* As will be shown, Congress' failure to provide an intelligible principle here was neither borne of necessity nor practicality. It instead resulted from a misunderstanding about the effects of air pollutants. And while Congress recognized its mistake over two decades ago, it consciously chose to ignore the conundrum its prior directive had created for EPA, thus abdicating its constitutional responsibility to provide meaningful guidance to the agency.

A. Congress Has Knowingly Failed to Provide EPA with an Intelligible Principle for Setting Air Quality Standards for Non-Threshold Pollutants.

In order to understand why Section 109(b)(1) fails to provide an intelligible principle by which to set air quality standards for non-threshold pollutants, it is necessary to review the history of the provision. When Section 109 was adopted in 1970, Congress assumed that the pollutants covered by the provision had discernible thresholds above which pollution levels threatened health and below which they did not. On this basis, legislators established a regulatory regime based on the intelligible principle that air pollution would be controlled by keeping the level of pollutants below their respective thresholds – "with an adequate margin of safety," 42 U.S.C. § 7409(b)(1). By 1977, however, Congress fully recognized that many Section 109 pollutants had no such thresholds at all. But despite a clear awareness of the nature of these pollutants and an express recognition of the economic and practical infeasibility of banning such pollutants altogether, Congress did not alter the provision, thus depriving EPA of an intelligible principle by which to set air quality standards for non-threshold pollutants.

1. The Clean Air Amendments of 1970

With the passage of the Clean Air Amendments of 1970, Pub. L. No. 91-604 (codified as amended at 42 U.S.C. §§ 7401-7671), Congress initiated a massive effort

to clean the nation's air. The National Ambient Air Quality Standards (NAAQS), 42 U.S.C. § 7409, which are supposed to represent the maximum concentrations of various air pollutants that are compatible with "public health and welfare," are a central component of that effort. The basic rules governing NAAQS are laid out in Sections 108 and 109 of the Clean Air Act. Pursuant to Section 108, EPA develops an "air quality" "criteria document" for "each air pollutant – emissions of which . . . cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" and "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." 42 U.S.C. § 7408(a)(1). Once these criteria documents are reviewed by the Clean Air Scientific Advisory Committee, 42 U.S.C. § 7409(d), EPA promulgates primary and secondary NAAQS for the pollutant, which are also reviewed by the Advisory Committee. The primary NAAQS is set at a level "requisite to protect the public health" with "an adequate margin of safety." 42 U.S.C. § 7409(b)(1). The secondary NAAQS is set at a level "requisite to protect the public welfare." 42 U.S.C. § 7409(b)(2).

The legislators' extensive discussion of ambient air quality in 1970 reveals that Congress at that time presumed that all pollutants addressed by Section 109 were "threshold pollutants" – namely pollutants with an identifiable level above which adverse health effects are observed and below which those health effects are absent. Because they believed that every relevant pollutant had a discernible threshold, legislators articulated the following principle by which to set air quality standards: A primary

NAAQS should be set safely below a pollutant's threshold level.

In order to assure that threshold levels for pollutants would not be surpassed, Congress directed EPA to isolate an exact threshold level for each pollutant, and then establish an air quality standard sufficiently below that level so as to avoid adverse health effects with "an adequate margin of safety."[12] See 43 Fed. Reg. 46,246, 46,247 (1978) ("It is clear from section 109 that [EPA] should not attempt to place the standard at a level estimated to be at the threshold for adverse health effects but should set the standard at a lower level in order to provide a margin of safety").

As Representative Rogers explained, "The Secretary . . . will set a national air quality standard for ambient air quality . . . based on criteria, scientific information as to how many parts per million are permissible for particular pollutants." Legislative History of the Clean Air Amendments of 1970 ("Legislative History"), Vol. II, at 819. Rogers, along with his colleagues, however, never conceived of the possibility that *zero* parts per million would be permissible for a particular pollutant. They had complete confidence in the threshold model

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[12] See Joseph Feller, *Non-Threshold Pollutants and Air Quality Standards*, 24 Envtl. L. 821, 823 (1994) ("A critical . . . assumption underlies . . . the structure of the Clean Air Act. . . . The assumption is that, for each pollutant of concern, there is a threshold concentration, represented by the NAAQS, above which the pollutant is a threat to health or welfare and below which it is not"); see also Cass Sunstein, *Is The Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 314 (1999).

because scientists had already identified safe non-zero thresholds for all pollutants studied pursuant to the Air Quality Act of 1967 that were likely to be regulated under Section 109.[13]

The expert testimony of Dr. John T. Middleton, Commissioner of the National Air Pollution Control Administration, exemplifies the scientific understanding of the time. In the context of extended testimony before the Senate Subcommittee on Air and Water Pollution on the Clean Air Amendments of 1970, Dr. Middleton lent credence to the threshold model by testifying that it could yield "a level of air quality that will be protective of health." *Id.* at 1184. According to Dr. Middleton, "The criteria documents state the level at which [health] effects begin, some measurable things that are observed to take place. The Clean Air Act provides that the standards shall be protective of health, which means they must be lesser than the level at which this thing was observed." *Id.* at 1185.[14]

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[13] These five pollutants – sulfur oxides, particulates, carbon monoxide, hydrocarbons, and photochemical oxidants – were at the time all considered threshold pollutants, as evidenced by exhibit 1 presented by Senator Muskie to the Senate. Legislative History of the Clean Air Amendments of 1970, Vol. I, at 243-47. The fact that thresholds had already been identified for these pollutants was referred to repeatedly throughout legislative reports and debates. See, e.g., Senate Committee on Public Works Report, *id.* at 409; Remarks of Representative Jarman, Legislative History, Vol. II at 815.

[14] The Senate Committee on Public Works Report demonstrates that the Committee concurred with Dr. Middleton's interpretation: "Ambient air quality is sufficient to protect the health of such persons whenever there is an *absence of adverse effect* on the health of a statistically related sample of

In adopting the threshold concept as the underlying principle by which air quality standards are set, Congress' original mandate to EPA was therefore quite simple. It directed EPA to isolate thresholds for air pollutants and then, without performing cost-benefit analysis, to promulgate strict standards with "an adequate margin of safety" to assure that those concentration levels were not reached. Or, as Senator Muskie put it, "[The Act] states that all Americans in all parts of the Nation should have clean air to breathe, air that will have *no* adverse effects on their health." Legislative History, Vol. I, at 224 (emphasis added).

2. The Clean Air Amendments of 1977

After passage of the 1970 Amendments, the EPA began setting air quality standards "on the assumption that [ ] thresholds d[id] exist."[15] By 1977, however, legislators knew that the language of Section 109 had been based on a myth – that pollutants covered by Section 109 standards were not all threshold pollutants. Indeed, several of the pollutants, including ozone, which were previously considered threshold pollutants, were now clearly

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persons in sensitive groups from exposure to the ambient air." *Id.* at Vol. I, 410 (emphasis added). Accordingly, the Committee instructed, "An ambient air quality standard, therefore, should be the maximum permissible ambient air level of an air pollution agent which will protect the health of any group of the population." *Id.*

[15] See Senate Comm. On Public Works, 93rd Cong., 2d Sess., Coordinating Comm. on Air Quality Studies, Nat'l Academy of Sciences, Air Quality and Automobile Emission Control 17 (Comm. Print 1974).

identified by legislators as non-threshold pollutants – pollutants that yield adverse health effects at *any* concentration level. Moreover, because non-threshold pollutants are adverse to public health at any level, legislators knew that setting "safe" standards for such pollutants was not only economically undesirable but, as a practical matter, impossible.[16] Nevertheless, Congress declined to provide EPA meaningful guidance in setting NAAQS for non-threshold pollutants.

The House Committee on Interstate and Foreign Commerce's Report on the 1977 Clean Air Amendments expressly declared that the threshold concept underlying the 1970 Amendments was misguided. The Committee admitted that while *"[t]he national primary standards are based on the assumption that a no-effects threshold exists and can be proved; in fact, this assumption appears to be false."* Legislative History of the Clean Air Amendments of 1977, Vol. IV, at 2577 (emphasis in original). It quoted a National Academy of Sciences study reflecting the scientific understanding of the time. That study concluded:

> [I]n no case is there evidence that the threshold levels have a clear physiological meaning, in the sense that there are genuine adverse health effects at and above some level of pollution, but no effects at all below that level. On the contrary, evidence indicates that the amount of health damage varies with upward and downward variations in the concentration level of the pollutant, with no sharp lower limit.

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[16] For example, ozone is present naturally in the atmosphere while PM results from almost all combustion.

Id. Ultimately, the Committee itself concluded: "[T]he 'safe threshold' concept is, at best, *a necessary myth to permit the setting of some standards.*" *Id.* at 2578 (emphasis added).

After admitting that the threshold concept was flawed, however, the Committee simply declined to address the enormous regulatory problem posed by non-threshold pollutants, namely how EPA can promulgate non-arbitrary standards for non-threshold pollutants without banning those pollutants altogether. The Committee concluded as follows: "Some have suggested that since the standards are to protect against all known or anticipated effects and since no safe thresholds can be established, the ambient standards should be set at zero or background levels. Obviously, this no-risk philosophy ignores all economic and social consequences and is impractical." *Id.* at 2594. The Committee therefore recognized that Section 109's language could not be logically applied to non-threshold pollutants, but proposed no alternative.

The House and Senate debates on the 1977 Clean Air Amendments mirrored the House Committee Report. In the House, Representative Bingham declared: "We now know that there is no such thing as a safe level of air pollutants. The only safe level of sulfur dioxides, nitrous oxides, hydrocarbons and the rest, especially given their synergistic effects, can only be zero." *Id.*, Vol. VII, at 6222. In the Senate, meanwhile, Senator Muskie stated: "[T]estimony on the health question over the last 7 years over and over again has made the point that there is no such thing as a threshold for health effects." *Id.*, Vol. III, at 1030. Accordingly, Senator Muskie conceded that

under the standards then in effect, "there [were] health effects that [were] not protected against." *Id.* Congress thus expressly disavowed the threshold concept without changing Sections 108 and 109 to reflect the newfound understanding of ambient air quality.

Because it did not wish to make an admittedly tough policy choice about which principle should guide the establishment of NAAQS for non-threshold pollutants, Congress left in place the anachronistic "requisite to protect the public health" "with an adequate margin of safety" language that does not provide an intelligible principle for air quality regulation. The statutory language is a complete mismatch with the scientific reality, as Congress itself recognized. Many adverse health effects can only be eliminated through a complete ban on non-threshold pollutants, yet Congress expressly dismissed this option as infeasible.[17] And, in any event, since ozone and nitrogen dioxide, among other non-threshold pollutants, occur naturally in the environment, EPA could not eliminate them entirely even if it wanted to do so. Therefore, as George T. Woolf, former Chairman of the EPA's Clean Air Scientific Advisory Committee has

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[17] Moreover, "public health" is really not even fully protected through a complete ban on non-threshold pollutants. For example, reducing ozone levels leads to adverse health effects, such as skin cancer, see Randall Lutter & Christopher Wolz, *UV-B Screening by Tropospheric Ozone: Implications for the National Ambient Air Quality Standards*, 31 Envtl. Sci. & Tech. 142A, 145 (1997), and efforts to rid the atmosphere of particulate matter would cause economic devastation and thus lead to a host of significant adverse health effects. See *American Trucking Associations, Inc.*, 175 F.3d at 1038 n.4.

recognized, the application of Section 109(b)(1), which is based on the 1970 threshold concept, to non-threshold pollutants, is not only undesirable but impossible.[18] Moreover, the existence of the "adequate margin of safety" mandated by the provision is itself contingent upon the existence of a threshold level above zero, a threshold level which in most cases does not exist. As such, the statute as written simply cannot be applied to non-threshold pollutants.[19] But despite its clear recognition of the dilemma created by its prior directive, Congress knowingly chose not to remedy its error and articulate an intelligible principle by which to regulate non-threshold pollutants.

B. EPA's Attempts to Set NAAQS Demonstrate that Congress Has Failed to Provide EPA with an Intelligible Principle for Setting Air Quality Standards for Non-Threshold Pollutants.

It is now known that most, if not all, of the six pollutants currently regulated under Section 109 are non-

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[18] Woolf has stated, "[T]he paradigm of selecting a standard at the lowest-observable-effects-level and then providing an 'adequate margin of safety' is not possible." EPA's Rulemakings on the National Ambient Air Quality Standards for Particulate Matter and Ozone: Hearings Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 105th Cong. 89 (1997) (statement of George T. Woolf).

[19] The House Committee on Interstate and Foreign Commerce itself recognized in 1977 "that the margin of safety concept is . . . an illusion." Legislative History of the Clean Air Amendments of 1977, Vol. IV, at 2578.

threshold pollutants.[20] In establishing NAAQS, EPA has acknowledged that it has been unable to identify any discernible threshold for adverse health effects with respect to ozone, see 62 Fed. Reg. 38,856, 38,863 (1997), particulate matter, see 62 Fed. Reg. 38,652, 38,670 (1997), sulfur dioxide, see 53 Fed. Reg. 14,926, 14,930 (1988), carbon monoxide, see 50 Fed. Reg. 37,484, 37,487-88 (1985), or nitrogen dioxide, see 50 Fed. Reg. 25,532, 25,538-39 (1985). And although EPA did identify a discernible threshold for the only other pollutant regulated under Section 109 – lead – in setting a 1978 NAAQS, see 43 Fed. Reg. 46,246, 46,247-49, it has since admitted that lead appears to be a non-threshold pollutant as well.[21]

Consequently, in implementing Section 109, EPA has faced the following choice: (1) set NAAQS for non-threshold pollutants at zero; or (2) arbitrarily select a non-zero standard at which adverse health effects still exist. Given that the first option is at odds with the intent of Congress and impossible to achieve (as well as economically devastating to attempt), it is not surprising that EPA has chosen the second path.

The problem with this choice, however, is that the Clean Air Act "provides no guidance as to how EPA

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[20] See Mark K. Landy, et al., *The Environmental Protection Agency: Asking the Wrong Questions from Nixon to Clinton* 55-56, 78-79 (1994).

[21] See Air Quality Management Division, U.S. EPA, *Review of the National Ambient Air Quality Standards for Lead: Assessment of Scientific and Technical Information*, at III-54 (1989) ("the available data . . . suggest a continuum of health risks down to the lowest levels measured").

should determine what non-zero level of risk is acceptable."[22] Because the Act is based on the anachronistic threshold concept, "the result of the statutory framework is to misframe the key question and also to give EPA little guidance for answering and asking that question."[23] The lack of direction provided to EPA is especially problematic because of the enormous impact the agency's policy choices can have on the nation's economy.[24]

Absent an intelligible principle by which to set NAAQS for non-threshold pollutants, EPA has behaved in one of two ways. First, in certain cases it has openly admitted that its standards do not guard against known adverse health effects, while making little if any effort to explain how allowing such effects to occur is consistent with the Act's requirement that standards protect public health "with an adequate margin of safety." For example, one wonders in the instant case why it is consistent with the statute for 58,000 children a year in nine of our nation's urban areas to experience "large lung function decreases" because of exposure to ozone, but inconsistent with the statute for 97,000 children to experience such effects. See 62 Fed. Reg. 38,856, 38,865; see also 43 Fed. Reg. 46,246, 46,253-55 (1978) (over 20,000 children will have unsafe blood lead levels under lead NAAQS).

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[22] Feller, *supra* note 12, at 832.

[23] Sunstein, *supra* note 12, at 376.

[24] For example, the cost of attaining EPA's revised PM standards is estimated to be anywhere from $37 billion to $150 billion annually, reducing the real after-tax income of the average American by 1-2%. See Brief of Respondents Appalachian Power Company, *et al.*, No. 99-1426, at 17.

Alternatively, EPA often seeks to disguise the arbitrary nature of its standards by mischaracterizing scientific data to make it appear as though a threshold may exist where in fact none does. As a former EPA attorney notes, "Where evidence suggests a continuum of effects at all pollutant concentrations, EPA has characterized the data as establishing uncertainty as to the threshold levels rather than suggesting that no threshold level exists."[25] This is encouraged by the Clean Air Act itself as "the need to choose some non-zero 'safe' level of pollution creates an incentive for this sort of risk recharacterization." *Id.* at 844. One commentator has identified the EPA's modus operandi as an "intentional science charade" where "agency bureaucrats consciously disguise policy choices as science."[26] Because no non-zero standard is "safe," EPA inevitably considers economic factors in setting standards though costs must be publicly disregarded by the agency because of the statutory language.[27]

The statute's lack of an intelligible principle thus makes effective judicial review of air quality standards impossible. Courts, like EPA, are given no guidance as to the level of adverse health effects that is acceptable, and must review rulemaking proceedings in which EPA understandably distorts complex scientific data and

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[25] Feller, *supra* note 12, at 838. For detailed case studies of this phenomenon regarding particulate matter and ozone, see *id.* at 838-854, and Wendy Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613, 1640-44 (1995), respectively.

[26] Wagner, *supra* note 25, at 1640.

[27] See *id.* at 1641.

refuses to acknowledge key factors influencing its decisions in a bid to fit a square peg in a round hole. If the status quo is maintained, one noted legal scholar has predicted, "The day will eventually come when the same court of appeals holds that EPA has behaved unlawfully both for regulating above a certain level and for regulating below that level!"[28]

III. THIS COURT SHOULD HOLD SECTION 109(B)(1) UNCONSTITUTIONAL AS APPLIED TO NON-THRESHOLD POLLUTANTS.

In asking this Court to invalidate Section 109(b)(1) as applied to non-threshold pollutants, *amici* recognize that we are asking this Court to take a significant step, but it is an appropriate one under the circumstances.

The decision as to what principle should be used to set air quality standards is "quintessentially one of legislative policy," *Industrial Union Dep't*, 448 U.S. at 686 (Rehnquist, J., concurring), and one with enormous impact on the health of the American people and the vitality of the nation's economy. It involves no subject, such as foreign affairs or Indian affairs, where the executive branch possesses "residual authority," *id.* at 684, nor any power, such as the management of public property, that is not legislative.[29]

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[28] Sunstein, *supra* note 12, at 322.

[29] In both areas, this Court has properly adopted a deferential stance with respect to congressional delegations. See Schoenbrod, *supra* note 11, at 1265.

Furthermore, Congress' failure to provide an intelligible principle here is not justified by the " 'inherent necessities' of the situation." *Id.* at 676. In a variety of other statutes regulating pollutants and hazardous substances, Congress has expressly set forth intelligible principles, such as cost-benefit analysis and technological feasibility, to guide agency discretion. See e.g., Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136(bb), 136a(c)(5)(D) (utilizing cost-benefit analysis); Clean Water Act, 33 U.S.C. §§ 1311(b)(1)(A), 1314(b)(1) (employing standards based on technological feasibility); Safe Water Drinking Act, 42 U.S.C. § 300g-1(b)(4)(D) (using standards of economic and technological feasibility). Moreover, agencies themselves have adopted principles for managing risk, such as defining a maximally acceptable risk, which Congress could use in this context.[30]

For constitutional purposes, it is not significant which principle is ultimately chosen; what is significant is that Congress supplies it. *Amici*, for instance, may agree with Cross-Petitioners that cost-benefit analysis from a policy perspective reflects a sensible way of developing air quality standards under Section 109. This purported interpretation, however, is no more supported by the language of the statute and the legislative history than is

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[30] See Joseph V. Rodricks, et al., *Significant Risk Decisions in Federal Regulatory Agencies*, 7 Regulatory Toxicology and Pharmacology, 307, 309-13 (1987).

a maximally acceptable risk standard, technological feasibility standard, or a host of other standards Congress could have supplied, but did not.[31]

While the D.C. Circuit thus correctly ruled that EPA's construction of Section 109(b)(1) in its ozone and PM rules effectuated an unconstitutional delegation of power, the remedy it ordered was inappropriate. In light of Congress' abdication of its responsibility to set forth an intelligible principle for setting air quality standards for non-threshold pollutants, the court's decision to allow EPA to "extract a determinate standard on its own" was in error. *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, 1038 (D.C. Cir. 1999). As no intelligible principle is "apparent from the statute," *id.* at 1034, or the legislative history, the appropriate remedy here is to hold Section 109(b)(1) unconstitutional as applied to non-threshold pollutants.

The underlying purpose of the nondelegation doctrine is not vindicated by a remedy ordering that "EPA in effect draft a different, narrower version of the Clean Air Act." *American Trucking Associations, Inc. v. EPA*, 195 F.3d 4, 15 (D.C. Cir. 1999) (Silberman, J., dissenting from denial of rehearing en banc). Section 109 either provides

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[31] While it could be argued that EPA's choice of any of these principles might pass muster under the framework of *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), this does not save the statute from a nondelegation doctrine challenge. On the contrary, the fact that multiple contradictory intelligible principles would pass muster under *Chevron* itself demonstrates that Congress has run afoul of the nondelegation doctrine by failing to supply *its own* intelligible principle for setting air quality standards.

an intelligible principle for setting NAAQS for non-threshold pollutants or it does not. If it does, EPA's failure to articulate that principle, while legally troubling on other grounds, does not implicate the nondelegation doctrine. But if, as we believe, Section 109 provides no such intelligible principle, the fact that EPA may be able to supply its *own* intelligible principle cannot save the statute from a nondelegation doctrine. *The constitutional basis of the nondelegation doctrine is that Congress, not executive agencies, must make important policy choices, which form the core of the legislative power.*

Though the precedent set here may contradict recent jurisprudential trends, the rule of law is really a modest one: Congress is free to legislate or not, or to delegate its authority or not, as it sees fit; all it may not do is to effectuate a wholesale transfer of the legislative power to the executive. That is the essence of the separation of powers. The crucial limiting factor is the requirement of an intelligible principle.[32] Accordingly, this Court should require Congress to fulfill its constitutional responsibility to set forth an intelligible principle by which EPA is to set air quality standards for non-threshold pollutants by holding Section 109(b)(1) unconstitutional as applied to non-threshold pollutants.

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[32] Limits must exist on Congress' ability to delegate legislative power to executive agencies. Surely, for example, Congress could not direct the Internal Revenue Service to set tax rates so that "the public interest, convenience, and necessity will be served." Cf. 47 U.S.C. § 309(a).

CONCLUSION

To paraphrase Chief Justice Rehnquist in *Industrial Union Dep't*, 448 U.S. at 687, if this Court is ever to reshoulder the burden of ensuring that Congress itself make critical policy decisions, this is surely the case in which to do it. For the foregoing reasons, *amici* respectfully request that this Court revitalize the nondelegation doctrine by holding Section 109(b)(1) of the Clean Air Act unconstitutional as applied to non-threshold pollutants.

Respectfully submitted,

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